PCIA Personal Communications Industry Association

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

May 6, 1996

BY HAND

Mr. David Furth, Chief
Commercial Wireless Division
Federal Communications Commission
2025 M Street, NW Room 7002-B
Washington, DC 20554

Re: Written Ex Parte Presentation In
WT Docket No. 96-6

Dear Mr. Furth:

Pursuant to our recent ex parte discussions in the referenced proceeding, this letter is submitted to provide further clarification of PCIA's position regarding the Commission's authority to preempt state regulation of CMRS offerings in accordance with the inseverability doctrine endorsed by the United States Supreme Court.

The attached analysis sets forth legal support for the inseverability doctrine, demonstrates that the intrastate and interstate aspects of fixed CMRS are inseverable and explains why fixed CMRS will not be a substitute for landline telephone exchange service for a substantial portion of the communications within a state for the foreseeable future.

After you have had an opportunity to review the attached analysis, please call me if you have any comments or questions.

Respectfully submitted,

PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

By: [signature]
Robert L. Hoggarth
Director - Regulatory Relations

cc: Office of the Secretary
Sandra Danner, Esq.

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PCIA Personal Communications Industry Association

WT Docket No. 96-6 -- May 1996

I. The FCC May Preempt State Regulation of Fixed CMRS Offerings in Accordance With the Inseverability Doctrine

A. The Inseverability Doctrine

The "inseverability" doctrine applicable to preemption by the Federal Communications Commission ("Commission") of state regulation (also sometimes referred to as the "impossibility exception") was endorsed by the Supreme Court in *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986). The Supreme Court, in addressing FCC preemption of inconsistent state regulation of telephone plant depreciation, observed that "[t]he critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law."[1] The Court found that Section 152(b) of the Communications Act of 1934, as amended, denied authority to the Commission to require state commissions to follow FCC depreciation policies for intrastate ratemaking purposes, and rejected the argument that "the FCC may nevertheless take action which it thinks will best effectuate a federal policy."[2] In pointing out that "it is certainly possible to apply different rates and methods of depreciation to plant once the correct allocation between interstate and intrastate use has

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[1] *Louisiana PSC*, 476 U.S. at 369.

[2] *Id.* at 374.

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been made,"[3] the Court included the following footnote, which forms the basis for the inseverability doctrine:

> Thus, these cases are readily distinguishable from those in which FCC pre-emption of state regulation was upheld where it was not possible to separate the interstate and intrastate components of the asserted FCC regulation. See, e.g., North Carolina Utilities Comm'n v. FCC, 537 F.2d 787 (CA4), cert. denied 429 U.S. 1027, 97 S.Ct. 651, 50 L.Ed.2d 631 (1976) ["*NCUC I*"], and North Carolina Utilities Comm'n v. FCC, 552 F.2d 1036 (CA4), cert. denied, 434 U.S. 874, 98 S.Ct. 222, 54 L.Ed.2d 154 (1977) ["*NCUC II*"] (Where FCC acted within its authority to permit subscribers to provide their own telephones, pre-emption of inconsistent state regulation prohibiting subscribers from connecting their own phones unless used exclusively in interstate service upheld since state regulation would negate the federal tariff).[4]

The United States Court of Appeals for the D.C. Circuit has been confronted with several cases since the Supreme Court's decision in *Louisiana PSC* involving challenges to the Commission's preemption of state regulation and the necessary application of the test set out by the Supreme Court. In *Public Service Commission of Maryland v. FCC*, 909 F.2d 1510 (D.C. Cir. 1990), the appellate court summarized the inseverability test as follows:

> FCC preemption of state regulation is thus permissible when (1) the matter to be regulated has both interstate and intrastate aspects; (2) FCC preemption is necessary to protect a valid federal regulatory objective; and (3) state regulation would "negate[] the exercise by the FCC of its

[3] *Id.* at 375.

[4] *Id.* at 375 n.4.

> own lawful authority" because regulation of the interstate aspects of the matter cannot be "unbundled" from regulation of the intrastate aspects.[5]

In that case, the Court upheld the federal preemption of state regulation of rates charged by local exchange carriers to interexchange carriers for disconnection of telephone service for nonpayment of interstate service bills. The Court acknowledged the Commission's justification for the preemption, that state regulation of such disconnection service might lead to excessive charges that would tend to frustrate the goals of the Communications Act and interfere with competition in the interexchange marketplace (including elimination of cross-subsidies from interexchange to intrastate services).[6] According to the Court, however, preemption cannot be justified solely on the basis that to do otherwise would be burdensome to carriers engaged in both interstate and intrastate communications or would interfere with Commission goals of accelerating technological advances.[7] Despite this admonition, the Court specifically concluded that "a direct effort by a state to impose costs on interstate service that the FCC believes are unwarranted seems rather clearly within the FCC's authority to prevent."[8] The Court further found that the interstate and intrastate aspects of the disconnection service could not be separated.

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[5] 909 F.2d at 1515 (citations omitted).

[6] *Id.* at 1515-16.

[7] *Id.* at 1516.

[8] *Id.*

Maryland PSC based its three-part test on several earlier D.C. Circuit opinions that applied the *Louisiana PSC* standard. In *National Association of Regulatory Utility Commissioners v. FCC*, 880 F.2d 422 (D.C. Cir. 1989),[9], the Court stated that "the only limit that the Supreme Court has recognized on a state's authority over intrastate telephone service occurs when the state's exercise of that authority negates the exercise by the FCC of its own lawful authority over interstate communication."[10] In that case, the Court found that the Commission may require the states to unbundle inside wiring from basic telephone services, but that the Commission's authority was limited to preempting state actions that would necessarily thwart or impede the operation of a free market in the installation and maintenance of inside wiring.[11]

In *Illinois Bell Telephone Company v. FCC*, 883 F.2d 104 (D.C. Cir. 1989),[12] the Court upheld the Commission's decision requiring the Bell Operating Companies ("BOCs"), as a condition of marketing customer premises equipment ("CPE") on an unseparated basis, to provide independent equipment vendors with the opportunity to market BOC network services, including Centrex, through sales agency plans or other means. The FCC preempted the states from imposing structural separation

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[9] *Maryland PSC* cited *NARUC* in support of the second and third elements of the test. *Maryland PSC*, 909 F.2d at 1515.

[10] 880 F.2d at 429.

[11] *Id.*

[12] *Illinois Bell* was cited by *Maryland PSC* in support of the first element of the three-part inseverability test. *Maryland PSC*, 909 F.2d at 1515.

requirements or inconsistent nonstructural requirements.[13] Ameritech argued that the Commission was precluded from imposing the sales agency requirement in connection with an intrastate service like Centrex.[14]

The Court found that Centrex was not exclusively an intrastate service but instead agreed with the Commission that Centrex supports both interstate and intrastate communications, specifically including interstate access.[15] The court found that the FCC had adequately explained its preemption order, beginning with its objective of promoting competition in the CPE market "by proscribing the unfair advantage BOCs might gain in that market through their near monopoly power in regulated markets and by attempting to minimize the efficiency costs on BOCs of any safeguards imposed."[16] The Commission's chosen means for reaching the objective, involving nonstructural safeguards, did not appear to the Court to be capable of severance into separate interstate and intrastate components.[17]

In discussing *Louisiana PSC* and that decision's endorsement of the *NCUC I* and *NCUC II* decisions, the Court noted the Supreme Court's apparent "recognition that strict separation of state and federal regulatory spheres in some settings would require

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[13] 883 F.2d at 108.

[14] *Id.*

[15] *Id.* at 113. The Court specifically observed that "consumers enjoy a statutory right to such interstate access, a right that is distinctly federal in character." *Id.*

[16] *Id.* at 115.

[17] *Id.*

construction of wholly independent intrastate and interstate networks and facilities, a result which seems at odds with Congress' intent."[18] Similar analysis applied in this case supported the Commission's finding that "federal regulation of the manner in which the interstate aspects of Centrex are marketed jointly with CPE cannot exist simultaneously with state regulation of the joint marketing of CPE and the intrastate component of Centrex.[19] The Court thus found that the Commission had "legitimately determined that inconsistent state regulation of joint CPE/service marketing would negate the valid federal goals" of the Commission's plan.[20]

In *Public Utility Commission of Texas v. FCC*, 886 F.2d 1325 (D.C. Cir. 1989),[21] the Court upheld the Commission's preemption of the Texas Public Utility Commission's ("Texas PUC") effort to restrict the interconnection of ARCO's private microwave system through Southwestern Bell's local exchange facilities rather than through GTE's facilities. The Court reiterated its conclusion in *NARUC* that it is not sufficient for the Commission to find that the facilities are physically inseparable into intrastate and interstate components;[22] rather, the FCC must not be able to separate the dual intrastate and interstate components of its regulation, and the FCC may

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[18] *Id.* at 116.

[19] *Id.*

[20] *Id.*

[21] *Texas PUC* was cited in *Maryland PSC* in support of the third prong of the test. *Maryland PSC*, 909 F.2d at 1515.

[22] 886 F. 2d at 1332.

preempt only where the exercise of state authority negates the ability of the Commission to exercise its lawful interstate authority.[23]

In that case, the Court stated that:

> [T]he question is whether the FCC's order, based on the record before it, could have been narrowed and yet still have achieved the asserted federal policy of ensuring ARCO's ability to interconnect with the public interstate network at locations of its choice -- so long as it is not publicly detrimental to do so -- without encroaching on Texas's power to control the intrastate certificating process.[24]

The Court found the Commission's explanation that acceding to the Texas PUC would effectively require the construction of duplicate networks for interstate and intrastate use, or effectively negate the federal right of interconnection to the public interstate network, to meet the applicable legal standards.[25] The court underscored that technological inseparability alone is not sufficient; rather, that inseparability must also make it impossible to separate the regulation.[26]

The Ninth Circuit also has sought to apply and explain the inseverability test as well (referred to as the impossibility exception by the Ninth Circuit). In *California v. FCC*, 39 F.3d 919 (9th Cir. 1994), the Court addressed the Commission's revised Computer III structure, upholding the FCC's preemption of state requirements for structural separation of facilities and personnel used to provide the intrastate portion of

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[23] *Id.*

[24] *Id.* at 1333.

[25] *Id.* at 1333-34.

[26] *Id.* at 1334.

jurisdictionally mixed enhanced services as well as conflicting CPNI and network disclosure rules.

The Court stated that the impossibility exception is "narrow," with the Commission having "the burden of showing that the state regulation would negate valid FCC regulatory goals."[27] The Court found this burden was met based on the Commission's determination that "it would not be economically feasible for the BOCs to offer the interstate portion of such services on an integrated basis while maintaining separate facilities and personnel for the intrastate portion. Thus, the FCC concluded, the BOCs would opt to comply with state requirements and provide such services entirely on a structurally separated basis" -- which would frustrate the Commission's goal of integrated offerings of enhanced and basic services.[28] The Ninth Circuit reiterated the same discussion in *California v. FCC*, No. 94-70197, slip op. (9th Cir. Jan. 31, 1996), in upholding Commission preemption of California's per line blocking default for intrastate calls in connection with caller ID services.

B. The Intrastate and Interstate Aspects of Fixed CMRS Are Inseverable

PCIA believes that Commission preemption of state regulation of fixed commercial mobile radio services ("CMRS") would withstand challenge under the

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[27] 39 F. 3d at 93, citing *California v. FCC*, 906 F.2d 1217, 1243 (9th Cir. 1990).

[28] *Id.* at 93.

standards articulated by the Supreme Court in *Louisiana PSC*, the D.C. Circuit, and the Ninth Circuit. The key to surviving a challenge to the FCC's preemption authority is a demonstration that the regulation of fixed CMRS cannot be separated into interstate and intrastate components, and that compliance with state regulatory requirements will interfere with achievement of lawful federal policies.

First, CMRS is inherently interstate and at the very least has both interstate and intrastate aspects. Both Congress and the Commission have recognized the fact that CMRS systems do and will span across state boundaries. Moreover, the basic licensing areas for some service, such as PCS and SMR, encompass areas in multiple states, thus rendering many calls within a give service area on a particular system inevitably interstate. Similarly, a number of cellular systems around the country, originally licensed on the basis of MSAs and RSAs, have been consolidated into much larger systems that cross state boundaries.

CMRS systems also resemble Centrex to the extent that such facilities provide access to interstate services. As the *Illinois Bell* and *Texas PUC* decisions made clear, such interstate access falls within the scope of the Commission's jurisdiction. Thus, CMRS clearly is not a purely intrastate service but has substantial interstate aspects as well.

Second, the Commission has a valid federal regulatory objective, backed by Congressional intent that this objective may preempt conflicting state law. Specifically, the Commission has been directed by Congress to promote a competitive national marketplace in CMRS, driven by economic forces and service design, rather than disparate regulatory requirements at either the federal or state levels.[29] This mandate is reflected in Congress' adoption of Section 332(c) of the Communications Act, as amended, in 1993.[30] Evidence of this federal regulatory objective is found in the provisions permitting forbearance from a number of common carrier obligations for CMRS licensees, the requirement that the Commission examine competitive market conditions in the industry, and the preemption of state regulation of rate and entry regulation (under the terms identified in the statute).

Consistent with that federal mandate, the Commission has authority to determine that the provision of fixed CMRS services is necessary to further the public interest and to assist in promoting competition in the CMRS marketplace. That conclusion, supported as it is by Congressional authority, meets the test of *Maryland PSC* that there be a valid federal regulatory objective.

Moreover, this objective is similar in significant respects to other rationales found by the courts to support preemption if the interstate and intrastate portions of the regulation cannot be "unbundled." Application of the preemption standard subsequent to the *Louisiana PSC* decision has generally involved the Commission's efforts to

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[29] The legislative history associated with Section 332(c) states that "[t]he intent of this provision, as modified, is to establish a Federal regulatory framework to govern the offering of all commercial mobile services." H.R. Rep. No. 213, 103rd Cong., 1st Sess. 490 (1993) ("*Conference Report*").

[30] Section 332(c) reflects Congressional intent that federal regulation preempt conflicting state law, consistent with the Supreme Court's statement in *Louisiana PSC*.

promote competition: in the interstate services marketplace (*Maryland PSC*); in the installation and maintenance of inside wiring (*NARUC*); and in the CPE market (*Illinois Bell*). In *California v. FCC*, 39 F.3d 919, the Court identified the Commission's regulatory objective as permitting integrated offerings of basic and enhanced services. Certainly, in this case, integrated offering of fixed and mobile CMRS is necessary in order to enhance the Commission's goal of a competitive wireless marketplace.

Third, regulation of the interstate and intrastate aspects of fixed CMRS cannot be unbundled and state regulation of fixed CMRS would effectively negate the exercise by the Commission of its lawful interstate authority. The inseparability of physical plant as well as of communications themselves gives rise to the regulatory inseparability. State regulation of any element of fixed CMRS -- rate or other terms and conditions -- could render carrier provision of interstate fixed CMRS practically impossible.[31] Any type of state rate or other regulation of intrastate fixed CMRS would inevitably place the licensees in the position of having to decide whether their interstate offerings can be made consistent with applicable state requirements.[32] The nature of the state requirements may lead carriers to conclude that providing fixed CMRS on an interstate basis cannot feasibly be done or can be done only on some

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[31] Under Section 253(a) of the Communications Act of 1934, state entry regulation of fixed CMRS would be prohibited.

[32] This situation is exacerbated by the fact that each state jurisdiction could impose its own unique set of requirements. Compliance with a crazy quilt of state requirements may provide further justification for carriers to decline to provide even fixed interstate CMRS.

restricted basis. The alternative would be for carriers to build separate intrastate and interstate CMRS networks -- clearly infeasible. This outcome would interfere with achievement of the Commission's legitimate federal regulatory policy. As a result, under current case law, the Commission is entitled to preempt state regulation of fixed CMRS.

II. Fixed CMRS Will Not Be a Substitute for Land Line Telephone Exchange Service for a Substantial Portion of the Communications Within a State for the Foreseeable Future

Some concern has been raised that perhaps the states should have regulatory authority over fixed CMRS if it becomes a substantial substitute for fixed wireless services. Clearly, that should not be a concern for some time to come. As the Department of Justice has pointed out in this proceeding, "wireline local loop competition is only at an incipient stage."[33]

There is little guidance on when fixed CMRS might become a full-fledged competitor to fixed local loop service and what it means for CMRS to serve as a substitute for land line telephone exchange service for a substantial portion of the communications within a state. The most help is found from discussions associated with Section 332(c)(3)(A) of the Communications Act, as amended. In discussing the phrase "such [CMRS] service is a replacement for land line telephone exchange service

[33] Comments of the United State Department of Justice, WT Dkt. No. 96-6, at 3 (filed Apr. 23, 1996).

for a substantial portion of the telephone land line exchange service within such State,"[34] the Conference Report stated:

> [T]he Conferees intend that the Commission should permit States to regulate radio service provided for basic telephone service if subscribers have *no* alternative means of obtaining basic telephone service. If, however, several companies offer radio service as a means of providing basic telephone service in competition with each other, such that consumers can choose among alternative providers of this service, it is not the intention of the conferees that States should be permitted to regulate these competitive services simply because they employ radio as a transmission means.[35]

The Commission also has attempted to interpret this language in the context of acting on petitions by state agencies to continue to exercise jurisdiction over CMRS. The Commission stated:

> [W]here CMRS is the only available exchange telephone service, we construe Section 332(c)(3)(A)(ii) to mean that Congress' interest in promoting universal telephone service outweighs its interest in permitting the market for CMRS to develop in the first instance unfettered by regulation. As a practical matter, all this means is that concerns about anticompetitive conditions in the market for CMRS will be given greater weight where a state can show that such service is the sole means of obtaining telephone exchange service in a substantial portion of a state.[36]

These discussions seem to indicate Congressional intent to permit state regulation of CMRS only if CMRS is the only available option for obtaining telephone exchange service.

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[34] 47 U.S.C. § 332(c)(3)(A)(ii).

[35] *Conference Report* at 493 (emphasis added).

[36] *Petition of Arizona Corporation Commission*, 10 FCC Rcd 7824, 7839 (footnote omitted).

This review the fact that an examination of the level of CMRS substitutability for local exchange service must be done on a statewide basis. CMRS licensee provision of service to a single high rise office building in a metropolitan area in no way represents the level of substitutability that should raise any questions as to whether states should be permitted to regulate fixed CMRS service. Moreover, the terms of the *Conference Report* suggest that if service is available from competing CMRS providers, then the states would continue to be foreclosed from regulating CMRS.

III. Implications of the Telecommunications Act of 1996

The Telecommunications Act of 1996 supports PCIA's assessment of the jurisdictional issues. In particular, Section 253(e) specifically provides that nothing in Section 253 shall affect the application of Section 332(c)(3) to commercial mobile radio service providers. As a consequence, the Commission has plenary authority over mobile, fixed, or integrated offerings of CMRS providers.